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IN THE

Supreme Court of the United States

OCTOBER TERM

1973

CROSBY & COMPANY, INC.,

Petitioner,

against

COMPAGNIE NATIONALE AIR FRANCE,
also known as AIR FRANCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Appellate Division of the Supreme Court of the State of New York, in the First Department

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PETITION FOR WRIT OF CERTIORARI
To the Appellate Division of the Supreme Court
of the State of New York, in the First Department

Petitioner, Crosby & Company, Inc., respectfully prays that a Writ of Certiorari issue to review the order and judgment of the Appellate Division of the Supreme Court of the State of New York, in the First Department, entered October 30, 1973 (which the Court of Appeals of the State of New York declined to review, by order dated and entered January 16, 1974). That order and judgment

affirmed a judgment of the Supreme Court, New York County, dated and entered June 20, 1973, which, on a motion by the defendant for summary judgment, dismissed the plaintiff's complaint.

THE OPINIONS BELOW

The Justice who considered and granted defendant's motion for summary judgment wrote an opinion which is reproduced at pages 25a-50a* infra. To date, that opinion has not been published in any report.

On appeal to the Appellate Division of the Supreme Court of the State of New York in and for the First Department, from the judgment entered on that opinion, that court affirmed the judgment without opinion (42 A D 2d 1050) by order dated and entered on October 30, 1973 which is reproduced at pages 16a-17a infra.

There was no other opinion apart from two memoranda on intermediate motions which are reproduced at pages 51a-59a infra.

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* Numerals followed by the letter "a" refer to the page number of the Appendix which follows page 47 infra.

JURISDICTION

(1). The order and judgment sought to be reviewed was dated and entered on October 30, 1973. Thereby the Appellate division of the New York Supreme Court, First Department, affirmed a judgment of the Supreme Court, New York County, dismissing Petitioner's complaint.

A timely motion in the Appellate Division for leave to appeal to the Court of Appeals of the State of New York was made on November 1, 1973 and was denied by an order rendered and entered on November 27, 1973.

Thereafter, on December 18, 1973, a timely motion for leave to appeal was made in the Court of Appeals. It was denied by an order rendered and entered on January 16, 1974.

Copies of the above mentioned orders are appended at pages 18a-20a infra.

The above motions for leave to appeal were made pursuant to Article VI Section 3 of the Constitution of the State of New York and Sections 5513, 5601 and 5602 of the New York State Civil Practice Law and Rules. Under those provisions a unanimous affirmance by an Appellate Division of a judgment

in a civil case which does not raise a constitutional issue, is not further appealable except by leave of the Appellate Division or the Court of Appeals. Such motion may be made to either court within 30 days; if made to and denied by the Appellate Division, a motion may be made in the Court of Appeals within 30 days after such denial.

If the applied for writ is issuable to the New York Court of Appeals rather than to the Appellate Division, it is respectfully prayed that this petition be deemed amended accordingly.

(2). This application is made pursuant to 28 U.S.C. 1257 (3) as a case where a right, privilege or immunity is specially set up or claimed under treaties or statutes of the United States.

The treaty involved is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, signed at Warsaw, Poland, on October 12, 1929, as amended, commonly known as "The Warsaw Convention" (49 Stat. 3000 et seq., T.S. 876; Appendix 49 U.S.C.A. pp. 87-91).

The pertinent statutes of the United States are the "Federal Aviation Program" of 1958, 49 U.S.C. 1301 et seq.

THE QUESTIONS PRESENTED FOR REVIEW

The questions presented by this case are:

1. Does the Warsaw Convention apply to the February 20, 1968 contract, described below, for 2,000,000 pounds of horse meat to be shipped in weekly instalments of 80,000 pounds?

2. If it does, do the exculpatory provisions and limitations, by their terms, apply or have those provisions been misconstrued?

3. Similarly, does the Federal Aviation Act or tariffs filed thereunder apply to the contract, there being no preference, rebate or discrimination?

4. Do the exculpatory provisions or limitations in a March 1968 air waybill covering a trial shipment of 21,795 pounds apply to the 2,000,000 pound February 20, 1968 contract?

5. Being in minuscule and illegible print,

do the provisions on the reverse side of the air waybill have any effect?

Each of those questions was decided in favor of Air France whereas Petitioner maintains that each should have been decided in Petitioner's favor.

This action, in which the above questions arise, is for damages for the frustration by the respondent (hereinafter referred to as Air France) of a contract between (i) Petitioner as a seller (in the United States), (ii) a Purchaser in France and (iii) Air France as a foreign international carrier by air. The contract was entered into on February 20, 1968 for the sale by Petitioner to the Purchaser and for carriage by Air France from New York to the Purchaser in Toulouse, France, of 2,000,000 pounds, in weekly instalments of 80,000 pounds, of frozen fresh killed horse meat for human consumption. At the instance of the Purchaser, the contract included a provision for a trial shipment and a clause reading: "This contract will be void if quality

of meat on trial shipment is not satisfactory to Marino Bondi" (the Purchaser). Air France culpably mishandled the trial shipment. In consequence, the Purchaser exercised his reserved right to "void" the contract. This action against Air France is for the consequent loss of profits.

Air France interposed as defenses provisions of the Warsaw Convention (see pp. 83a-96a infra) and urged also provisions of the Federal Aviation Act and provisions said to be contained in Air France's "Air Cargo Rules Tariff" filed pursuant to that act and, also, provisions in its air waybill covering only the March 1968 20,795 pound trial shipment. On the basis of those defenses, the complaint was dismissed by a summary judgment.

THE TREATY AND STATUTES INVOLVED

Articles 1, 5, 6, 8, 9, 10, 11, 18, 19, 20, 21-26, 28, 29 and 33 of the Convention for the Unification of Certain Rules relating to International Transportation by Air, signed at Warsaw, Poland, on October 12, 1929, usually known as the

Warsaw Convention (49 Stat. 3000 et seq; Appendix 49 U.S.C.A. pp. 87-91) which defendant invoked, or have a bearing thereon, are set forth at pages 1a-10a infra.

The defendant invoked also 49 U.S.C. Chapter 20, Section 1301 et seq. All of the relevant portions of that Chapter, including Section 1373(a) are reproduced at pp. 11a-14a infra.

Defendant invoked also "Rule 2 (D)" of its "Local and Joint International Air Cargo Rules No. CR-2". That is set forth at page 15a infra. Presumably, nothing else on file with the Civil Aeronautics Board is material.

STATEMENT OF THE CASE

The Sued On Contract

As already stated, the action herein is for damages for causing the frustration of a contract between (i) Petitioner as a seller (in the United States), (ii) a purchaser in France, and (iii) Air France as an international carrier by

air, for the carriage from New York to the purchaser in Toulouse, France, of 2,000,000 pounds, in weekly instalments of 80,000 pounds, of frozen fresh killed horse meat for human consumption.

The contract is reproduced at pages 60a-69a infra.

It stipulated that the horse meat be frozen at the plant "to a temperature of 14° Fahrenheit" (pp. 60a-61a infra) and it stipulated that the temperature "on arrival" should be between zero and two degrees centigrade during the winter and between two and four degrees centigrade during the summer (pp. 64a, 65a infra). At the instance of the purchaser, the contract incorporated a provision for a trial stipulation and a clause reading: "This contract will be void if quality of meat on trial shipment is not satisfactory to Marino Bondi" (the purchaser).

The contract was solicited by Air France, through its "Sales Representative" in the New York Cargo region. It was entered into after a year of negotiation, initiated, persevered in and conducted

by that Sales Representative and his Superior, the New York Cargo District Manager (Record on Appeal* in the Appellate Division pp. 43-9, 133-41, 147-50, 172, 184-204).

The record shows that the Sales Representative, in pre-trial examination, testified that his duties were "to sell and promote the ... of air cargo transportation in general" (R A 47) and that his purpose in negotiating with Petitioner and the purchaser was "mainly to arrange for the transportation of the horse meat ... to arrange a course ... a series of transactions ... to get that traffic" (id. 148-9).

The contract consisted of a letter dated February 1, 1968, from the plaintiff addressed to Air France, Cargo Division, was "accepted" by the purchaser with two amendments and by Air France with a signature in its behalf by its Cargo District Manager "as per letter NYC. FF dated Feb.

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* Hereinafter referred to as RA

16th Feb 20, 68" (p.64a infra). (The "Feb 20, 68" at the foot of plaintiff's letter of February 1, is the date of the signature by the Manager.) The letter of February 16th thus incorporated, was addressed to plaintiff, was signed by the same New York Cargo District Manager and was "accepted" by the plaintiff (p. 69a infra).

Performance of the contract would have yielded Air France $380,000 (at the rate of 19 cents per pound) for the carrying of the 2,000,000 pounds of meat from New York to Toulouse.

Because that revenue and plaintiff's prospective profit hinged on satisfaction with the trial shipment, the trial shipment was accompanied by Air France's Sales Representative and also by a representative of the plaintiff on the plane, and both proceeded to Toulouse (R A 153, 159-169).

Air France's Culpable Mishandling of The Trial Shipment

Despite the pivotal importance of the trial shipment, Air France, concededly, so egregiously mishandled the trial shipment that the horse meat arrived in Toulouse, France, in so putrefied condition, that upon its arrival it was condemned by the French Health Authorities, in the presence of Air France's "Sales Representative" and the plaintiff's representative, and then was destroyed by those authorities.

Air France (for the purpose of its motion for summary judgment) conceded that: it exposed the meat, after its arrival at Kennedy Airport, for over 15 hours in the open air before loading it on the plane; it crammed the meat into a plane which had no refrigeration; it delayed the departure of the plane for a number of hours; upon the arrival of the horse meat at Orly Airport, Paris, instead of immediately shipping it to Toulouse by air, where it would have arrived within an hour, defendant stuck the meat into a truck which was

too small and unrefrigerated or inadequately refrigerated and which did not arrive in Toulouse until 24 hours later.

The Purchaser's Cancellation of the Contract

Naturally, the Toulouse purchaser was dissatisfied with the quality of the trial shipment meat upon its arrival, and he exercised his reserved right to "void" the contract.

In consequence, the plaintiff, in the words of the complaint, "was deprived of the profit it would have made on this sale ... of the two million pounds provided for in the ... agreement", amounting to $100,000.00.

Air France's Invocation of the Warsaw Convention Limitations and Immunities

To the complaint for the lost profits of $100,000.00, Air France, in its answer (reproduced at pp.81a-100a infra), included four defenses predicated on the Warsaw Convention. It cited and quoted Articles 1, 5, 8, 10, 11, 18, 19, 20, 21,

22, 24 and 26 (see pp. 84a-96a infra) and demanded "judgment dismissing the complaint against it, and in the alternative, for judgment limiting its liability under the provisions of the Warsaw Convention ...".

The Motion for Summary Judgment

In moving for summary judgment of dismissal, the affidavit of one of the attorneys for Air France referred to a previous motion by the plaintiff for the dismissal of Air France's affirmative defenses "on the ground that they respectively failed to set forth the material elements of a defense and failed to state a defense, and on their face, have no merit ..." and that motion had been denied with a memorandum.* The affidavit for Air France continued:

> "Defendant has denied and continued to deny, inter alia, the accuracy of the plaintiff's description of the facts

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* The memorandum is reproduced at pp. 51a-53a infra.

> forming the basis of this action. However, for the purposes of this motion for summary judgment, except as set forth in the accompanying affidavit of Stephen Mackevicius, the defendant will assume, arguendo, the accuracy of plaintiff's factual allegations (not the legal conclusions) in paragraphs 5 through 8 of plaintiff's complaint and paragraphs 2 through 10, 12 through 17, 19, 20 and 22 of the plaintiff's bill of particulars, ..."

In the referred to accompanying affidavit of Mackevicius, Air France's "Legal Services Manager", he added as a further basis for judgment in its favor "pertinent [emphasis added] portions of Air France Cargo Rules Tariff No. CR-2, C.A.B., No. 17 which was filed pursuant to the Federal Aviation Act with the Civil Aeronautics Board and which was in effect on March 12, 1968" (R A 93-4). Reliance was limited to "Rule 2(D)" of those "pertinent portions" (R A 94). That read (R A 105; p. 15a infra):

"All carriage of cargo governed by this tariff shall be subject to the rules, regulations and conditions of carriage in effect on the date that the transportation begins"

Mr. Mackevicius continued (R A 94):

"Those conditions of carriage are set forth on each air waybill and appear on the aforementioned air waybill covering the shipment in question".

And he argued (R A 94):

"Those conditions of carriage limited Air France's liability and also limited the time permitted for the plaintiff to give written notice of its claim. These limitations reflect those of the Warsaw Convention, which was also applicable to the transportation in question" (Id).

The tiny crowded print on the reverse side (p. 75a infra) of the air waybill/which Air France prepared (and the delivery of which is disputed) is the only document which is claimed to have given actual notice

of the claimed limitations.

The Memorandum Decision

The Justice who granted the motion for dismissal, in his 25 page Memorandum Decision (pp.25a-50a infra), at the outset of his decision, expressed the conclusion (pp. 30a-31a infra):

> "Air France's only legal obligation under the alleged agreement was to act as a transfer agent of funds for [the purchaser] Marino Bondi" [emphasis added].
>
> * * * * *
>
> "Consequently, there was no question at the time the alleged agreement was entered into, that the only obligation that could have been legally imposed upon Air France under the agreement was to act as a transmittal agent for Marino Bondi's funds . . . Any obligation of Air France to avoid wrongful acts or omissions in transporting the

trial shipment to France did not arise under the alleged agreement" [emphasis added].

The Justice added (p. 33a):

"It seems noteworthy that a portion of Section 6 [of the contract] reads as follows:

'Conditions of carriage in regards to this traffic shall be those as convened on the transportation contract shown on the air waybill.' [Emphasis added]

Since the air waybill "included a limitation of liability", the Justice hopped to the conclusion that "those conditions of carriage" applied

"to all shipments proposed in the plaintiff's letter of February 1, 1968, and not just to the shipment eventually transported under an air waybill on which these conditions appear." (pp. 33a infra; emphasis added).

There follow over 15 pages (pp.34a-50a infra)

of discussion of the Warsaw Convention, the Federal Aviation Act and Air France's Rules Tariff No. CR-2, C.A.B. No. 17, with citations and quotations of numerous cases* which led him to the conclusion that the liability and notice of claim limitations in the Warsaw Convention applied to the frustration of the 2,000,000 pound contract and also that the contract was "governed by the provisions of the Federal Aviation Act ... and, consequently this Act and the Tariffs filed in conformance and compliance therewith are the exclusive sources of the regulations and interpretations of the contract of carriage" (p. 37a infra).

These tariffs, the Justice continued, "containing [Air France's] rules and regulations" ... control this case. Thereunder the "conditions of carriage" that were set forth on the air waybill were "binding" and two provisions therein, "a limit of liability and a time limited for claim ... dispose of the plaintiff's action herein" (p.42a infra; emphasis added).

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* without noting the distinction between domestic and international carriage

Accordingly, the Justice concluded, "On the defendant's motion for summary judgment, the complaint should be dismissed ..." (p. 50a infra). Such a judgment was thereafter entered. A copy thereof appears at pages 21a-24a infra.

Petitioner's Appeal

A timely appeal was prosecuted in the Appellate Division. Air France reiterated all its contentions and added a suggestion that the contract, as viewed by the plaintiff, was illegal, citing Feraco Inc. v. Georgia Pacific Corp., 313 F. Supp. 660, 662 (D.C. Del. 1970), and United States v. Associated Air Transport, 275 F 2d 827 (5th Cir. 1960).

As previously noted, the Appellate Division affirmed the judgment, without any comment whatsoever.

The Subsequent Proceedings

As noted at pages 3-4 supra, successive timely motions to the Appellate Division and the Court of Appeals for leave to appeal to the Court

of Appeals were respectively denied by orders dated and entered respectively on October 30, 1973 and January 16, 1974. Copies of those orders are appended at pages 18a-20a infra. Each of the denials was without any comment.

REASONS FOR ALLOWANCE OF THE APPLIED FOR WRIT

1. It is manifest that the case is governed exclusively by Federal Law.

The basic question is whether, by reason of the Warsaw Convention or by reason of the Federal Aviation Act or Air France's tariff thereunder or its March 12, 1968 air waybill for the 21,795 pound trial shipment or, possibly, as a matter of public policy - all of which are matters of Federal law - the agreement between the parties, as set forth in their signed and integrated writings, immunized Air France from liability for frustrating the February 20, 1968 two million pound contract by inexcusable and appalling mishandling of the critical trial shipment.

If any of those codes apply to the February 20, 1968 contract, another question is: Is petitioner's claim for the culpable frustration thereof by Air France barred by the terms of any of their exculpatory and limitation provisions?

It has been and is petitioner's position that

(a) The Warsaw Convention and the air waybill and the filed tariff applied only to the 21,795 pounds of the meat shipped in March 1968 and had no effect on the February 20, 1968 contract providing for 25 weekly shipments.

(b) Even if deemed applicable, the limitations as written do not have the exculpatory effect attributed to them - for a number of reasons which are set forth in the course of pages 33-45 infra.

(c) The air waybill, moreover, can be given no effect whatsoever in respect to an international carriage under the rule of Lisi v. Alitalia-Linee Aeree Italiane, 370 F 2d 508 (2d Cir. 1966) affd 390 U.S. 1039 (1968), and there is no substance in the contention

that the rule is limited to passenger tickets and baggage checks and does not apply to air waybills despite the uniformity of the Convention language in regard to all three of those categories.

2. The basic questions thus presented, it is submitted, are of substantial general importance to this country's international trade. The Justice who dismissed the complaint correctly characterized this case as a "significant commercial controversy" (p. 29a infra; emphasis added)

The February 20, 1968 contract is not an isolated engagement. It is apparent that Air France employs "sales representatives" who solicit term contracts for a course or a series of periodic carriage of cargo. In the words of the "Sales Representative" who, in association with Air France's "Cargo District Manager", solicited and negotiated the contract in this case, his duties were to "sell and promote the service of air cargo transportation in general" and his particular purpose in this case was "to arrange a course ... a series of transactions ... to get

that traffic" (RA 147-9). Presumably, other airlines do likewise.

Such contracts are highly advantageous to the carrier, shipper and consignee. They assure the carrier specified quantities of cargo at specified times - here during a specified period 25 weekly shipments of an aggregate of 2,000,000 pounds and $380,000 of revenue; they assure business concerns the necessary space and facilities for carriage at specified times - here 2,000,000 pounds in 25 weekly instalments and $530,000 of revenue; they assure the purchaser continuity of delivery of specified quantities at specified times.

If such a contract may be breached by the carrier with impunity, then the commercial community should have notice of it by a decision of this Court. Why should such a business-getting and business assuring contract be treated differently from any other business contract which carriers may enter into?

It is respectfully suggested that rather shocking is the holding in this case that under a

term contract for $380,000 cargo revenue to the carrier and $100,000 or $130,000 profit to the shipper, the carrier is totally immune from liability for the loss it caused the plaintiff by culpably mishandling the trial shipment upon which, to the carrier's knowledge, the contract hinged.

3. Neither the Warsaw Convention nor Chapter 20 of 49 U.S.C. nor Air France's tariffs thereunder proscribe (or provide for) such term contracts. Hence, it is submitted that breaches are subject to common law principles. On that basis, the Court of Claims in Northwest Airlines Inc. vs. United States, 444 F 2d 1097 (1971), enforced a provision in a term contract for advanced blocked-space that such space when not properly cancelled and not used should be fully paid for as stipulated in the contract.

4. In essence, there is no distinction between a contract of the nature here involved and a reservation of a seat for a specific flight.

Whatever exculpatory provisions may be set forth in a flight ticketdoes not apply to the engagement to furnish the passage, and for a breach of that engagement, the carrier is held liable for whatever damage such breach causes and,in addition, is assessed exemplary damages (Wills v. Transworld Airlines, Inc., 200 F. Supp. 360 (D.C., S.D.Cal., (1961) - actual damage $1.54, exemplary $5,000; Nader v. Allegheny Airlines, Inc., (U.S.D.C., D.C. 10/18/73, 42 U.S.L.W. 2233, not otherwise reported - actual damage $20, exemplary $50,000).

Similarly, in holding a railroad liable for the damage caused by its failure to perform an agreement to furnish a railroad car on a specific date for the transportation of cattle to a specific market on a specific market day, the New York Court of Appeals in Clark v Ulster & Delaware Railroad Company, 189 N Y 93(1907), disregarded the fact that the railroad's standard live stock transportation contracts excluded liability for such failure. The Court distinguished contracts for prospective carriage from contracts which cover

actual carriage and refused to import into the former the limitations of the carriage contract.

5. Prohibitions of "any undue or unreasonable preference or advantage" or of "any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatever"/(49 U.S.C. 1374(b)) do not apply, since there is no claim and not an iota of evidence that the contract gave plaintiff or Bondi any such advantage or, in any way, was prejudicial to any other shipper, actual or potential.

6. There appears to be no authority in support of the determination which is sought to be reviewed.

Neither of the two cases cited by Air France - Feraco Inc. v. Georgia Pacific Corp., 313 F. Supp. 660 (D.C. Dec. 1970) nor United States v. Associated Air Transport, supra, 275 F 2d 827 (5th Circ. 1960)- has any application.

In the Feraco case, there was an oral understanding, the performance of which, the Court found, involved preferential treatment and shutting out of others' shipments. Moreover, the defendant

was a domestic motor freight carrier.

The case against Associated Air Transport has absolutely nothing in point; on the contrary, although there were term contracts in that case, there was no suggestion that for that reason they were illegal.

7. In the absence of the erroneous notion that an international carrier (foreign or domestic) may not enter into contracts for carriage over a period of time, it seems inconceivable that the Justice who dismissed this case or any competent Judge would hold that the February 20, 1968 contract was devoid of "legal obligation" other than to act as a transfer agent of funds. The specific provisions for (i) weekly deliveries by plaintiff to Air France's "JFK International Airport Cargo Building #86", (ii) for air waybills to be issued at the "JFK's office", (iii) for payments to be made to plaintiff by Air France out of funds which (iv) the purchaser agreed to "deposit with Air France" - considered cumulatively - inexorably implied a reciprocal

undertaking by Air France to accept and properly carry the specified weekly instalments and to receive from the purchaser the funds he undertook periodically to deposit and to pay the petitioner therefrom as specified. Only if the purchaser failed to make his promised deposits was Air France to be free of liability.

It is noteworthy that the Justice in this case did not say that the contract by its terms imposed no obligation on Air France as a carrier - which was its primary business - other than to act as a transfer agent of funds. What the Justice said is that the contract imposed upon Air France only the "legal obligation ... to act as a transfer agent (pp. 30a-31a infra; emphasis added). Thereby, he clearly was construing the contract on the basis of what he conceived to be the legal limitations and not its language.

In any event, since the contract was for international carriage from the United States by a foreign carrier governed by Federal law acting under a Federal permit issued under a Federal statute

and subject to the jurisdiction of a Federal agency, it is submitted that the construction of the contract is a matter of Federal law and thus is reviewable by this Court. Surely, in such a case this Court is not bound by a misconstruction of such a contract (United States v. Pink, 315 U.S. 203, 217-18 (1942); Cornell Steamboat Company v. Phoenix Construction Co.,233 U.S. 593, 599 (1914); St. Louis and Iron Mountain Railway v. McWhiter, 229 U.S. 265, 276-7 (1913)), especially in a case where under the authentic New York law* there can be no doubt that Air France obligated itself to act as a carrier by air from New York to Toulouse of the 2,000,000 pounds, at specified times, in a specified way, with due care, so long as the contract was performed by the Petitioner and by purchaser Bondi. Clearly, the contract was fully mutual and reciprocal in all its phases and bound Air France to properly perform its part so long as the contract was performed by the other two parties.

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* E.g. Wood v. Duff-Gordon, 222 N.Y. 88 (1917); Marks v. Cowdin, 226 N.Y. 138, 143 (1919); Muzak Corp. v. Hotel Taft Corp., 1 N.Y. 2d 42, 46-7 (1956)

SUPPORTING ARGUMENT

I

THE WARSAW CONVENTION DOES NOT APPLY TO CAUSES OF ACTION FOR FRUSTRATION OF TERM CONTRACTS AS DISTINGUISHED FROM CAUSES OF ACTION FOR THE VALUE OF A SHIPPED CARGO OR FOR DAMAGE THERETO.

The basic contention that the Warsaw Convention applies only to contracts *of* shipment and not contracts *for* shipment, as set forth at pages 21-30 *supra*, petitioner believes requires hardly any supplementation.

The distinction between the air waybill (assuming it valid) covering the March 1968 21,795 pound shipment and the 2,000,000 pound contract of February 20, 1968, seems obvious. That distinction was pointedly made in *Clark* v. *Ulster & Delaware Railroad Company*, 189 N.Y. 93 (1907) *supra*. The distinction also is the implicit rationale of *Northwest Airlines* v. *United States*, 444 F 2d 1097 (1971) *supra*, of *Wills* v. *Transworld Airlines Inc.*, 200 F. Supp. 360 (1961) *supra*, and of *Nader* v. *Allegheny Airlines Inc.* *supra*.

The distinction, moreover, appears in the terms of the February 20, 1968 contract. That document makes no mention of the Warsaw Convention. Nor does it set forth any limitations of liability under the contract. Indirectly, it provides only:

> "Conditions of carriage in regards to this traffic shll be those as convened on the transportation contract shown on the air waybill" (emphasis added).

Thus, the air waybill to be issued for each shipment will constitute "the transportation contract" containing the "conditions of carriage" governing that shipment. Nothing is said by way of limiting liability under the overall contract other than in case the purchaser defaults in his obligation to deposit funds. Moreover, the reference for "conditions of carriage" is to the "air waybill" and not the Warsaw Convention.

Although the distinction seems obvious and finds implicit support in the above mentioned cases, there is absent a direct controlling authority which,

this case demonstrates, is needed for the guidance and protection of the business community which engages in international trade depended upon international carriage by air.

II

EVEN IF THE SUED ON CONTRACT BE DEEMED TO BE WITHIN THE PURVIEW OF THE WARSAW CONVENTION, THE INVOKED LIABILITY LIMITATIONS TEXTUALLY ACCORD NO DEFENSE.

The pertinent provisions of the Convention (with added underscoring) are:

"Article 1

(1) This convention shall apply to all international transportation ... performed by aircraft for hire ...

. . . . .

Article 8

The air waybill shall contain the following particulars:

. . . . .

(m) The amount of the value declared in accordance with article 22(2);

. . . . .

(q) A statement that the transportation is subject to the rules relating to liability

established by this convention.

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

. . . . .

Article 18

(1) The carrier shall be liable for damage sustained ... if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

. . . . .

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air ...

. . . . .

Article 22

. . . . .

(2) In the transportation of ... goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor had made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and had paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

. . . . .

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the

damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

. . . . .

Article 26

. . . . .

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

. . . . .

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

. . . . .

Article 31

(1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of article 1.

. . . . . "

Here the horse meat was in a plane only about 8 of the approximately 60 hours which intervened between arrival of the 21,795 pounds at Kennedy Airport on March 11, 1968 at about noon and the arrival thereof at Toulouse on March 14th at about 5 A.M. local time (approximately midnight New York time).

Of the other 52 hours, the horse meat was in a properly refrigerated truck the first 10 hours; then, at the direction of Air France's personnel, over petitioner's protest, the horse meat was removed from the truck and put out in the open air until the afternoon of the following day; then the

horse meat was crowded into an unrefrigerated plane which took the horse meat to Orly Airport; then, instead of transporting the meat to Toulouse by air which would have taken about an hour (RA 159), the horse meat was crammed into an unrefrigerated or inadequately refrigerated undersized truck which did not arrive at Toulouse until 23 or 24 hours later (RA 72-6, 149-167, 172-4).

Did the putrefaction take place before arrival at Toulouse? Or most likely, as the evidence indicates, did it take place during the 24 hours in the unauthorized transportation by truck from Orly Airport to Toulouse?

Be that as it may, the totality of the conceded mishandling of the cargo, as outlined above and at pages 12-13 supra, certainly constituted "wilful misconduct or ... such default on [the part of the carrier] as, in accordance with the law of the court to which the case is submitted, is considered to be the equivalent of "wilful misconduct", and, under Article 25 of the Convention disentitles the carrier from availing itself "of

the provisions ... which exclude or limit his liability".

It is also of some significance that where the liability limitation in Article 22 applies, the amount of the liability in the absence of a declaration is "250 francs per kilogram" ($7.52 per pound (p. 35a infra). That, for the 21,795 pounds, amounted to $163,898.40 - $63,898 in excess of the $100,000 sued for herein. Thus the amount sued for did not entail a "supplementary" charge.

The notice of claim requirements in Article 26 of the Convention, even if the Convention applied, would have no effect on this case. That is so for each of four reasons:

1. They are excluded by Article 25 which nullifies them in cases of "wilful conduct" or its equivalent.

2. Article 26 provides for notice only by "the person entitled to delivery". The Convention contains no provision for notice by any other person. Thus notice is not required

of claims of persons other than the one "entitled to delivery".

3. Air France on March 26, 1968 informed petitioner "that Bondi has taken steps to file a claim for the total loss of the shipment" (p. 101a infra). Presumably, since nothing was said to the contrary, that claim was deemed timely. If it be argued that such a limited claim by the "person entitled to delivery" did not cover the claim made here, that can serve only to emphasize the inapplicability of Article 26. Surely the petitioner's rights which were not derived from the consignee could not be prejudiced by what the 'person entitled to delivery' chose to do by way of a claim. Obviously, the consignee could make a claim only for himself and not for petitioner.

4. Air France's "Sales Representative" accompanied the shipment on the plane and was at Toulouse on the morning of the arrival of the horse meat there. He received immediate and

direct notice of the condition in which the horse meat arrived and of the condemnation and destruction thereof by the health authorities. On March 26, 1968 Air France's New York Cargo District Manager, in the letter already mentioned, informed petitioner thereof (p.102a infra). He also informed petitioner that there would be no further shipments until Bondi advised Air France otherwise and promised: "We shall not fail to keep in touch ...".

III

INSOFAR AS THE DEFENSES DEPEND UPON THE AIR WAYBILL, THEY ARE RULED OUT ALSO BY THE DOCTRINE OF LISI V. ALITALIA-LINEE AERREE ITALINE, 370 F 2d 508 (2d CIR. 1966), AFFD. 390 U.S. 1039 (1968)* AND EGAN V. KOLLSMAN INSTRUMENT CORPORATION, 21 N Y 2d 160 (1967).

(1). The air waybill has no significance other than as an incorporator (if valid) of the Warsaw Convention as setting forth the "conditions of [the] carriage" of the 21,795 pounds of horse meat covered thereby.

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* Rehearing denied 391 U.S. 929.

(2) However, it did not fulfill even that function, for several reasons.

Whether the air waybill was delivered to the petitioner is a disputed issue (RA 73, 77, 172-6, 208). That dispute, of course, is not resolvable without an evidentiary hearing, and none took place.

It is not disputed that the relied on air waybill was made out by Air France, not by the consignor as required by the Convention; and the consignor was not consulted. The value specified in the air waybill apparently was taken from the invoice to purchaser Bondi.

Above and beyond the foregoing, it is not disputable that the "conditions of contract" appearing on the reverse side of the air waybill are at least of as minuscule type and illegibility as those contained in the above mentioned Lisi and Egan cases. An examination of the accurately reproduced air waybill at pages 74a-75a (note especially 75a), infra demonstrates that the air waybill in this case falls within the condemnation

of those cases.

Those cases establish that to have any legal effect, provisions in an air waybill of international cargo must be in reasonably large and distinct type.

While those cases arose under passenger tickets or baggage checks, no reason is apparent for holding them inapplicable to transportation of cargo under air waybills, since the provisions in the Convention as to each of the categories are completely parallel.

Article 3, in respect to passenger tickets provides:

"(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention

which exclude or limit his liability.'

Article 4, in regard to baggage checks provides:

"(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."

In respect to air waybills, Article 5 provides:

"(2) The absence, irregularity, or loss of [an air waybill] shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention."

And the thus referred to Article 9 provides:

> "If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability."

Under such completely parallel language, if minuscule type and illegibility are the equivalent of total absence of a passenger ticket or of a baggage check containing the specified requirements, then it inexorably seems to follow that an air waybill of that character likewise is a nullity.

However, there appears to be no specific authority to that effect or to the contrary.

(3). The court below was misled by the numerous cases which he cited holding that the filed tariffs govern regardless of absence of notice of their provisions. He failed to realize that those cases related exclusively to domestic transportation and do not apply to international carriage governed by the procedures required by the Warsaw Convention.

IV

THE FEDERAL AVIATION STATUTES (49 U.S.C. 1301 ET SEQ) AND AIR FRANCE'S RULES TARIFF FILED THEREUNDER HAVE NO SIGNIFICANT IMPACT ON THIS CASE.

In respect to the regulation of foreign air carrier-shipper duties and obligations, the federal statutes do no more than (i) recognize the paramountcy of the Warsaw Convention (49 U.S.C. 1501), (ii) require the filing of tariffs and adherence thereto, and (iii) prohibit discrimination (49 U.S.C. 1301, 1372-4).

Of Air France's filed "Cargo Rules Tariff", it invoked and quoted only Rule 2(D) which read (15a infra):

> "Effective Rules: All carriage of cargo governed by this tariff shall be subject to the rules, regulations and conditions of carriage in effect on the date that the transportation begins."

Obviously, by itself that is wholly meaningless.

V

IN THE ABSENCE OF A VALID LIMITATION OF LIABILITY, PETITIONER CLEARLY IS ENTITLED TO ITS LOSS OF PROFITS.

American Synthetic Rubber Corp. v. Louisville & Nashville Railroad, 422 F 2d 462, 467 (6th Cir. 1970)

Whitlock Truck Service Inc. v. Regal Drilling Co., 333 F 2d 488 (10th Cir. 1964)

Marquette Cement Manufacturing Co. v. Louisville & Nashville Railroad, 281 F.Supp. 944, affd. 406 F 2d 731 (6th Cir. 1969)

Czarnikow-Rionda Co. v. Federal Sugar Refining Company, 255 N.Y. 33, 41-7 (1930)

CONCLUSION

It is respectfully submitted that the prayed for writ of certiorari should issue.

Respectfully submitted,

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April 8,1974.